

Congress Should Amend the Fair Debt Collection Practices Act to Allow Residential Loan Servicers to Contact Borrowers Free of “Miranda” to Prevent Default and Foreclosure

MBA RECOMMENDS

Congress should enact the proposed amendment to the Fair Debt Collection Act in order to ensure servicers can easily communicate with borrowers to prevent foreclosure.

During 2003 through 2006, home prices increased at a pace that far exceeded inflation. During that time, many mortgages were written with adjustable interest rates and/or negative amortization features. In 2007, the “real estate bubble” burst, resulting in record borrower defaults.

THE PROBLEM

While servicers have executed a record number of repayment plans and loan modifications to assist borrowers with delinquencies, servicers are unable to contact certain borrowers within the parameters of the Fair Debt Collection Practices Act (FDCPA). The FDCPA regulates the practices of independent debt collectors. While creditors collecting their own debts are generally exempt from the FDCPA, creditors that acquire delinquent loans are not exempt. Given that few borrowers pay their mortgages on the due date (the note’s definition of “default”), most all purchased servicing fall within the parameters of FDCPA. This limitation to the creditor/assignee exemption has created considerable uncertainty in the mortgage industry.

In addition to its substantive anti-abuse protections for debtors, the FDCPA requires a debt collector to notify the borrower in the first written communication with the borrower that it is attempting to collect a debt and that any information obtained will be used for that purpose (the so-called “Miranda” warning) and to indicate that each subsequent communication is from a debt collector,

even after the borrower has brought the loan current. These disclosure requirements create unique difficulties for mortgage loan servicers because it chills the borrower’s willingness to discuss options, which may prevent foreclosure, with the creditor.

THE SOLUTION

MBA urges the administration and Congress to consider an exemption from the FDCPA Miranda requirements for mortgage servicers. The Miranda provision is designed to prevent debt collectors from concealing their true identity when they attempt to obtain information from a consumer. Mortgage servicers are generally not true debt collectors despite the treatment under FDCPA. Moreover, there is never any question that a mortgage servicer is trying to conceal its identity. The mortgage servicer is the party responsible for receiving the borrower’s monthly mortgage payments. And if a borrower gets behind on those payments, the mortgage servicer is expected to contact the borrower to assist the borrower in catching up. This process is the same whether or not the servicing responsibilities are transferred to a new servicer. Indeed, in a servicing transfer context, the FDCPA’s Miranda notices may convey the misleading impression that the loan has been referred to a traditional, independent debt collector, when in fact, all that has happened is that the servicing rights have been transferred from one servicer to another — often as part of a larger portfolio of loans.

PROPOSED FD CPA AMENDMENT

MBA proposes an amendment that is narrowly crafted to address the problems created when the FD CPA's Miranda provision is applied to mortgage loan servicers. The amendment would apply only to first lien residential mortgage loans that are acquired by bona fide loan servicers, not professional debt collectors. It would exempt them only from the notice requirements of the FD CPA's Miranda provision. All of the other consumer protection under FD CPA would continue to apply. MBA suggests the following amendment be placed into FD CPA after §817

and the current §818 should be re-designated as §819:

A mortgage servicer who, whether by assignment, sale or transfer, becomes the person responsible for servicing mortgage loans secured by first liens that include loans that were in default at the time such person became responsible for the servicing of such mortgage loans shall be exempt from the FD CPA Miranda requirements in connection with the collection of any debt arising from such a defaulted related mortgage loan.



1331 L Street, NW
Washington, DC 20005
www.mortgagebankers.org